

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

US FOODS, INC.

Employer

and

Case 31-RC-262089

TEAMSTERS LOCAL 63

Petitioner

DECISION AND DIRECTION OF ELECTION

On June 23, 2020,¹ Teamsters Local 63 (Petitioner or Union) filed a representation petition under Section 9(c) of the National Labor Relations Act (Act) seeking to represent a bargaining unit of delivery drivers employed by US Foods, Inc. (Employer) out of its Fontana, California facility (Fontana facility), located in San Bernardino County, California. There are approximately 58 employees in the petitioned-for unit.

A videoconference hearing on the petition was held on July 15 before a Hearing Officer of the National Labor Relations Board (Board). No issues were litigated at the hearing. The sole matter to be decided in this case is whether, considering the continuing COVID-19 pandemic,² the Region should conduct a manual or a mail-ballot election. Petitioner maintains a mail ballot election is the appropriate choice under the circumstances present, while the Employer argues that a manual election can be conducted safely and is the necessary choice.

The Board has delegated its authority in this proceeding to me under Section 3(b) of the Act. Based on the entire record in this proceeding, relevant Board law, and the extraordinary circumstances of a pandemic, for the reasons described more fully below, I shall direct a mail-ballot election commencing on the earliest practicable date.

I. FACTUAL OVERVIEW AND POSITIONS OF THE PARTIES

A. The COVID-19 Pandemic in the United States

On March 13, President Donald J. Trump issued a “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak.”³ The impact of the COVID-19 pandemic on daily life has been profound. The Centers for Disease Control and

¹ All dates are in 2020 unless otherwise noted.

² Throughout this decision, the terms “COVID-19,” “coronavirus,” and “virus” are used interchangeably.

³ <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> (last accessed July 21, 2020).

Prevention (CDC),⁴ an agency of the United States government, has determined “[t]he best way to prevent illness is to avoid being exposed to the virus,” as there is currently no approved vaccine or antiviral treatment, and “[m]inimizing person-to-person transmission of SARS-CoV-2 is critical to reducing the impact of COVID-19.”⁵ According to the CDC, “[t]he virus that causes COVID-19 is spreading very easily and sustainably between people” and “the more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread.” *How COVID-19 Spreads*.⁶ Many of the measures recommended by the Federal, state, and local governments to prevent the spread of the virus are well-known at this point: avoid social gatherings, avoid discretionary travel, practice good hygiene, maintain at least a 6-foot distance between individuals, and use cloth face coverings when around other people. *How to Protect Yourself & Others*.⁷ The CDC has also issued publications regarding pre-symptomatic and asymptomatic transmission of COVID-19, including the *Emerging Infectious Disease Journal* (Online Report) for July, “Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic.”⁸ The Online Report emphasizes, “transmission in the absence of symptoms reinforces the value of measures that prevent the spread of [COVID-19] by infected persons who may not exhibit illness despite being infectious.” Despite these unprecedented efforts to limit transmission, as of July 22, over 3.8 million people in the United States have been infected with COVID-19 and 141,677 people have died.⁹

Although it has not directly addressed Board elections, the CDC has issued guidance on elections in general. Its *Considerations for Election Polling Locations and Voters* states officials should “consider offering alternatives to in-person voting if allowed” and that “[v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.”¹⁰ The CDC further states the virus can survive for a short period on some surfaces and that it is possible to contract

⁴ I take administrative notice of the information, guidance, and recommendations of the CDC regarding COVID-19. See “Coronavirus (COVID-19)” and pages linked therein. <https://www.cdc.gov/coronavirus/2019-ncov/> (last accessed July 21, 2020).

⁵ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed July 21, 2020); “Predicting the Decay of SARS-CoV-2 in Airborne Particles.” <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed July 21, 2020).

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last accessed July 21, 2020).

⁷ Ibid.

⁸ See https://wwwnc.cdc.gov/eid/article/26/7/20-1595_article (last accessed July 21, 2020). See also, “The implications of silent transmission for the control of COVID-19 outbreaks.” *Proceedings of the National Academy of Sciences of the United States of America (PNAS)*. <https://www.pnas.org/content/early/2020/07/02/2008373117> (“even if all symptomatic cases are isolated, a vast outbreak may nonetheless unfold ... we found that the presymptomatic stage and asymptomatic infections account for 48% and 3.4% of transmission, respectively”) (last accessed July 21, 2020).

⁹ See <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html> (“Elections with only in-person voting on a single day are higher risk for COVID-19 spread ...”) (last accessed July 21, 2020). See also Governor of the State of California Executive Order N-64-20. <https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/> (“WHEREAS to preserve public health in the face of the threat of COVID-19, and to ensure that the November election is accessible, secure, and safe, all Californians must be empowered to vote by mail, from the safety of their own homes ...”) (last accessed July 21, 2020).

COVID-19 by touching a surface or object that has the virus on it and then touching one's mouth, nose, or eyes," but "it is unlikely to be spread from domestic or international mail, products or packaging." *Am I at risk for COVID-19 from mail, packages, or products?*¹¹ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: "After collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol." *Running Essential Errands*.¹²

B. The COVID-19 Pandemic in California and San Bernardino County

Many state and municipal governments have issued restrictions responsive to the COVID-19 pandemic tailored to the particular circumstances present in specific communities. On March 4, the Governor of the State of California (Governor) declared a "State of Emergency to Help State Prepare for Broader Spread of COVID-19."¹³ On March 19, the Governor issued Executive Order N-33-20 ordering all individuals living in the State of California (California) to stay home, except as to maintain continuity of operations for the Federal Critical Infrastructure Sectors.

On May 4, the Governor issued a press release¹⁴ announcing that based on California's progress in meeting metrics tied to indicators, California could begin to move into Stage 2 of modifying Executive Order N-33-20 on May 8, with guidelines released on May 7. In doing so, the Governor noted that the situation is "still dangerous and poses a significant public health risk." The Governor further announced that while California would be moving from Stage 1 to Stage 2, its "counties can choose to continue more restrictive measures in place based on their local conditions, and the state expects some counties to keep their more robust stay at home orders in place beyond May 8, 2020." *Ibid*.

The California Department of Public Health (CDPH) monitors data related to COVID-19 for each of California's 58 counties, including San Bernardino County where the Fontana facility is located. If a county does not remain below established thresholds for a seven-day average for positive cases per day, elevated disease transmission, increasing hospitalization, and limited hospital capacity, it is placed on the County Monitoring List, which is then used to reinstitute health measures such as closing business sectors and restricting gatherings and travel.

On July 2, the Governor ordered 19 counties (Health Officer Orders), including San Bernardino County, that had been on the County Monitoring List for three consecutive days to "close all bars, pubs, brewpubs, and breweries, whether operating indoors or outdoors" and cease indoor services for restaurants, wineries and tasting rooms, family entertainment centers and

¹¹ See <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last accessed July 21, 2020).

¹² See <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (last accessed July 21, 2020).

¹³ See <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>.

¹⁴ See <https://www.gov.ca.gov/2020/05/04/governor-newsom-provides-update-on-californias-progress-toward-stage-2-reopening/>.

movie theaters, zoos, museums, and cardrooms.¹⁵ The Health Officer Orders also noted, “[p]ublic health studies have shown that the risk of transmission is exacerbated in indoor spaces, particularly when lacking appropriate ventilation.”

On July 13, after 29 counties, including San Bernardino County, had remained on the County Monitoring List for at least three consecutive days, the Governor expanded the restrictions from the previous Health Officer Orders to the rest of the state and reinstated additional closures for San Bernardino County and others on the County Monitoring List to include the indoor operations of gyms and fitness centers, places of worship, indoor protests, offices for Non-Critical Infrastructure Sectors, personal care services (including nail salons, massage parlors, and tattoo parlors), hair salons and barbershops, and malls.¹⁶

As of July 21, San Bernardino County remained on the County Monitoring List, failing to meet the thresholds for elevated disease transmission and increasing hospitalization.¹⁷ According to CDPH, San Bernardino County is “experiencing elevated disease transmission and increasing hospitalizations,” which the CDPH attributes to “1) community transmission from gatherings, 2) *workplace transmission*, 3) transmissions at state prison, state hospital, county jails and academy, and skilled nursing facilities, 4) transfer of patients from Imperial County.”¹⁸ (emphasis added).

Although communities nationwide have taken these steps to prevent or slow the spread of COVID-19, the virus has continued to have a devastating impact in California and throughout the United States. As of July 22, according to data released by the San Bernardino County Department of Public Health, there were 25,775 confirmed cases of COVID-19 in San Bernardino County and 337 people have died from COVID-19.¹⁹

C. The Employer’s Operation and COVID-19

The Employer is a food service distributor, and its Fontana facility has continued to operate during the pandemic as an essential element in the food supply chain. On a daily basis the drivers in the petitioned-for unit report to the Fontana facility and make deliveries to customers. Some of these deliveries are contactless, made to customers during the overnight hours when no one is present, and some deliveries are made to customer’s employees. The parties are not in agreement regarding how frequently drivers have contact with customer employees.

¹⁵ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Order%20Closing%20Indoor%20Services%20and%20Sectors-San%20Bernardino.pdf>.

¹⁶ See <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>.

¹⁷ San Bernardino County also announced a testing supply shortage as recently as July 21, posting on Twitter: “Due to testing supply shortages we have only been able to open a limited amount of appointments for July 22-24 at this time.” <https://twitter.com/SBCountyPH/status/1285634577726410752> (last accessed July 21, 2020). See also “San Bernardino County canceled 11,000 COVID-19 tests this week due to supply shortage.” *Desert Sun*. Regarding the ongoing shortage, see <https://www.desertsun.com/story/news/health/2020/07/10/san-bernardino-county-canceled-11-000-covid-19-tests-week/5417872002/> (last accessed July 21, 2020).

¹⁸ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx> (last accessed July 21, 2020).

¹⁹ See <https://sbcovid19.com/> (last accessed July 22, 2020).

At the hearing, it was undisputed that the Employer during the pandemic has asked some employees to self-quarantine because they were exhibiting symptoms consistent with COVID-19. The circumstances that led the Employer to make these requests are not detailed in the record, and the Employer was unable to quantify the number of employees asked to quarantine in this manner. The Petitioner maintains employees employed at the Fontana facility have tested positive for COVID-19. At hearing, the Employer took the position that it was unaware of any employee testing positive.

D. The Employer's Proposed Safety Precautions for a Manual Election

The Employer proposes that the election be conducted in a conference room of the Fontana facility. It maintains that this area, 31 feet long and 17 feet wide, is large enough to accommodate three separate tables with plexiglass screens, arranged six feet apart to accommodate the Board agent, Employer observer, and Union observer, and with a fourth table in the corner of the room to constitute the polling area. The Employer further maintains the space is large enough that observers, the Board agent, and voters can maintain a six-foot distance.

Additionally, the Employer proposes arranging the voting area with separate entrance and exit points from the hall leading to the voting area so that voters will not need to pass one another after voting. The Employer will also sanitize the voting area immediately prior to the arrival of the Board agent and the opening of the polling area before each voting session. The Employer also commits to supplying sanitizer, masks, wipes and gloves in the voting area. As proposed by the Employer, the polling periods would consist of three, two-hour windows, with approximately 20 voters working per shift. Because of the nature of their work as drivers, the Employer maintains voters will be arriving and depart from the Fontana facility at staggered times, decreasing the likelihood of voters congregating while waiting to vote.

Although not specific to the election, the Employer notes that all participants in a manual election would be subject to its screening protocols. Under these protocols, the Employer requires that anyone, both employees and visitors, arriving at the Fontana facility have their temperature taken and respond to a series of health questions regarding possible virus symptoms. If an employee or visitor has a fever above 100.4 or responds to one of the health questions that suggests possible virus infection, the person is required to leave the Fontana facility. As part of the election, the Employer has also proposed to repeat this screening process immediately outside the voting area. This "wellness station" would be staffed by a customer service or office clerical employee who has no authority over the drivers.

Finally, the Employer also asserts that practices that have become common practice during the pandemic at the Fontana facility would continue and contribute to a safe manual election. These practices include social distancing among employees, a practice of bleaching and sanitizing all surfaces and equipment every hour and maintaining an ample supply of hand sanitizer made available for employees and visitors.

The Fontana facility is approximately 60 miles from the Regional office.

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E. The Parties' Positions Concerning Election Details

The Petitioner seeks a mail ballot election. The Petitioner maintains that the best information available at this time suggests that person-to-person contact, and the corresponding droplet transmission, poses the greatest risk of spreading COVID-19. While a mail-ballot election may entail some risk, it is almost certainly a lower risk than that of a manual, person-to-person election. The Petitioner also argues that congregating for a manual election, even if technically allowed, is certainly not consistent with the spirit of the current stay-at-home orders, noting that the instructions provided by the State of California specifically prohibit professional gatherings, with gatherings defined as “events that bring together persons from multiple households at the same time for a shared or group experience in a single room, space, or place such as [a]... large conference room.”²⁰

In contrast, the Employer maintains I should direct a manual election. First and foremost, the Employer argues a manual election is proper because of the Board’s presumption that elections will take place manually, absent extraordinary circumstances. The Employer maintains that because a safe manual election can be conducted, in the manner described above, no circumstances are present requiring a mail ballot election. In support of this contention, the Employer notes its proposed manual election would meet the protocols set forth in the recent memorandum regarding manual elections issued by the General Counsel of the Board (GC 20-10), a memorandum I address in the following section. Thus, the Employer proposes conducting a manual election on August 11 with three separate two-hour voting periods: 8:00 a.m. to 10:00 a.m., 4:00 p.m. to 6:00 p.m., and 8:00 p.m. to 10:00 p.m.

The Employer also argues that the alternative to a manual election, a mail ballot election, is both less safe and less likely to reflect a majority view than a manual election. Regarding the first contention, the Employer maintains a mail ballot election likely creates greater risk of exposure to COVID-19 than a manual election, as there would be no safety requirements regarding the handling of the mailed ballots; they would be intermingled with mail from an indeterminate number of individuals and handled by an unknown number of mail carriers and others. A manual election, in contrast, would involve little contact with possibly contaminated documents, inasmuch as a manual election requires only the Board Agent conducting the election and each voter, to handle a single piece of paper (the ballot), and they would be provided gloves and face masks. Regarding participation, the Employer argues the Board prefers in-person elections because they tend to maximize participation. The Employer maintains manual elections have historically resulted in a voter turnout of approximately 90 percent, if not greater, while rates of participation in mail ballot elections conducted during the pandemic have been, on average, less than 50 percent, and in one case less than 10 percent.

II. AGENCY DIRECTIVES AND LEGAL AUTHORITY

The Board is charged, under Section 9 of the Act, with the duty to conduct secret ballot elections to determine employees’ union representation preference and to certify the results of such elections. The Board’s obligation to perform the function of conducting secret ballot elections must be taken very seriously, particularly at this time when the nation and the local

²⁰ <https://covid19.ca.gov/stay-home-except-for-essential-needs/>.

community are facing public health and economic crises. I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety considerations in the context of a pandemic. Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

Although the Board prefers to conduct manual elections over conducting mail ballot elections, the Board has acknowledged that circumstances may necessitate adaptations on the Board's part to facilitate an election. In *National Van Lines*, 120 NLRB 1343 (1956), the Board asserted that "circumstances surrounding working conditions in various industries require an adaptation of established election standards to those peculiar conditions." 120 NLRB at 1346, citing *Shipowners' Association of the Pacific Coast, et al.*, 110 NLRB 479, 480 (1954). The Board noted that, "[b]ecause of these circumstances, the Board has invested Regional Directors with broad discretion in determining the method by which elections should be conducted." *Id.*; see also NLRB Casehandling Manual (Part Two) Representation Procedures Sec. 11301.2 (Casehandling Manual).²¹ Thus, "[o]nly where it is affirmatively shown that a Regional Director has clearly abused the discretion afforded him [or her] to conduct representative elections will the Board nullify an election and prescribe other election standards." *National Van Lines*, 120 NLRB at 1346.

The Board has determined that there are some instances in which a mail ballot election is appropriate because "of circumstances that would tend to make it difficult for eligible employees to vote in a manual election." *San Diego Gas and Electric*, 325 NLRB 1143, 1144 (1998). The Board has clarified that Regional Directors should consider, at a minimum, where employees are located geographically, if employees are temporarily scattered, whether there is an ongoing strike, lockout, or picketing, and the ability of voters to read and understand a mail ballot. *Id.* at 1145. The Board went on to say that there may be other relevant factors to consider and that "extraordinary circumstances" may warrant a departure from the specific guidelines articulated in that case. *Id.*

Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, a Regional Director may exercise discretion to order a mail-ballot election where conducting an election manually is not feasible and, under extraordinary circumstances, the Regional Director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. In addressing the COVID-19 pandemic, the Board has recognized the discretion afforded to Regional Directors in election matter. In this regard, when the Board issued an announcement titled "COVID-19 Operational Status"²² on April 17 regarding the COVID-19 pandemic, it stated in pertinent part:

²¹ I note the provisions of the Casehandling Manual are not binding procedural rules; the Casehandling Manual is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994)); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988); *Aaron Medical Transportation, Inc.*, 2013 WL 6673598 (2013) (unpublished) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007)); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

²² See <https://www.nlr.gov/news-outreach/news-story/covid-19-operational-status-update>.

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

On July 6, General Counsel Peter Robb issued a memorandum titled “Suggested Manual Election Protocols.” (GC 20-10). In that memorandum, the General Counsel acknowledges that the protocols suggested therein are not binding on Regional Directors because the Board, not the General Counsel, has authority over matters of representation, and he reiterates that Regional Directors have the authority, delegated by the Board, to make “initial decisions about when, how, and in what manner all elections are conducted.” The General Counsel further notes Regional Directors have, and will:

make these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locality.

Among other suggestions in GC 20-10, the General Counsel proposes self-certification that individuals in proximity to the polling place, including observers and party representatives, have not tested positive for COVID-19, come into contact with someone who tested positive within the preceding 14 days, are not awaiting test results, and are not exhibiting COVID-19 symptoms. GC 20-10 does not provide an enforcement mechanism for any of its suggestions other than canceling an election, which would delay resolution of the question concerning representation.

I note that the Board has denied review of Regional Directors’ decisions to conduct mail-ballot elections due to local COVID-19 circumstances although employers have offered to follow the same or similar protocols as those identified in GC 20-10. See, for example, *Johnson Controls, Inc.*, Case 16-RC-256972 (Order dated May 18, 2020) (denying review where employer had zero COVID-19 cases, daily screened all individuals accessing the facility for symptoms, mandated face coverings and social distancing, and offered an outdoor election with plexiglass barriers, sanitizer, single-use writing utensils, floor markings for social distancing, masks, and gloves).²³ Recently, on July 14, the Board, in an Order denying a request for review in *Brink’s Global Services USA, Inc.*, Case 29-RC-260969, addressed a mail-ballot determination in the context of the COVID-19 pandemic and with consideration of GC 20-10. In footnote 2 to that Order, the Board found the COVID-19 pandemic to be “extraordinary circumstances” as contemplated by *San Diego Gas*. With respect to GC 20-10, the Board did not formally adopt its guidance, noting only the following: “The Board will continue to consider whether manual

²³ The Regional Director’s Decision and Direction of Election, dated May 7, 2020, and the Board’s May 18, 2020 Order are available on the Board’s public website at <https://www.nlr.gov/case/16-RC-256972>.

elections should be directed based on the circumstances then prevailing in the region charged with conducting the election, including the applicability to such a determination of the suggested protocols set forth in GC Memorandum 20-10.”²⁴

III. ANALYSIS

The circumstances surrounding the COVID-19 virus are extraordinary. Whether a mail-ballot election is appropriate requires considering in each case both the public health concerns presented by the COVID-19 pandemic and the Board’s stated preference for manual elections. I recognize that the Board has traditionally preferred manual elections. However, I also am mindful of my obligation to appropriately exercise my discretion concerning the timing and manner of the election with due consideration to safety concerns in the context of a pandemic. Thus, it is my obligation to conduct an election in this matter at the earliest practicable time and in the most responsible and appropriate manner possible under the circumstances.

I acknowledge that absent the public health concerns arising from the pandemic, I likely would order a manual election in this case. However, for the reasons articulated earlier, this election will not be held under normal circumstances. I recognize a degree of reopening has begun, in the United States generally and in California specifically. I also recognize that in San Bernardino County, not only does COVID-19 remain present in the local community, but an ongoing surge in confirmed cases presents a significant health risk. As noted above, current Federal, State, and San Bernardino County public health guidance strongly recommends discouraging gatherings to reduce the risk of exposure to and spread of COVID-19, and a mail ballot election minimizes such risk. Based on the facts outlined above and for the reasons detailed below, I find that is appropriate to direct a mail ballot election in this case because: the current pandemic conditions constitute extraordinary circumstances that merit deviation from a manual election; a mail ballot election is the safest method of conducting an election under the circumstances; and, in comparison to a manual election, a mail ballot election avoids disenfranchising voters due to the pandemic.

A. The Risks Associated With the COVID-19 Pandemic Constitute Extraordinary Circumstances

Although questions regarding the transmission of SARS-CoV-2 and the nature of COVID-19 abound, the basics of the pandemic from a public health perspective are at this point quite familiar: it is a contagious virus, for which there is currently no approved vaccine or antiviral treatment, that often causes a serious, and at times fatal, illness. I find the COVID-19 pandemic presents extraordinary circumstances that make conducting a mail-ballot election the most responsible and appropriate method for conducting a secret ballot election to determine the employees’ union representation preferences in light of the current COVID-19 situation in San Bernardino County. The safety of the voters, the observers, the party representatives, and the Board agent conducting the election must be considered in determining the appropriate method for conducting the election. The Employer’s employees remain working at the Employer’s facility because they perform essential services, and because of the nature of the work, no

²⁴ The Order is available on the Board’s public website at <https://www.nlr.gov/case/29-RC-260969>.

alternative exists to perform their work remotely. However, the Board does have an acceptable alternative to conducting a manual election.

Manual election procedures inherently require substantial interaction, and that interaction generates risk. I appreciate the Employer's efforts to mitigate this risk by making certain accommodations in an effort to allow for a degree of social distancing and protection during the election consistent with GC 20-10. I recognize that these accommodations and the GC 20-10 manual election protocols might reduce the risk of transmission, but given the current high incidence of COVID-19 at the locality where the election would take place and the substantial inevitable interaction and potential exposure associated with a manual election, the protocols do not alleviate my concerns about conducting a manual election under the current situation at this locality. Voters, observers, and party representatives would all need to travel to and appear at the Fontana facility to participate in the election. Party representatives, the observers, and the Board agent would have to gather for approximately 15 to 30 minutes for the pre-election conference, including inspection of the voting area, though I recognize that GC 20-10 suggests that this may could take place by video. More significant, the Board agent and observers would need to share a conference room, which is a confined area, for a period of at least six hours, i.e. the voting period plus the vote count. The observers would need to check in voters on the voter list, in a process intended to allow for visibility of the checked list to both observers and the Board agent, although GC 20-10 does suggest the use of multiple voter lists. The Board agent must provide a ballot to each voter, which per GC 20-10 could be done by placing a single ballot on a table, which each voter must then mark in a voting booth and then place into one shared ballot box. Board agents often need to assist voters with placing their ballots in challenged ballot envelopes and completing the necessary information on the envelopes. Given the span of the election, the Board agent and observers might need to use a restroom at the Fontana facility, typically before and after the closing of the polls. The Board agent must also count the ballots cast by all voters at the end of the election, which is typically done in the same voting area, with the observers, party representatives, and other employees who wish to attend. The vote count, thus, would extend the time that the observers and the Board agent would spend in the confined area of the conference room beyond simply the voting period windows. Furthermore, the Employer's proposed three separate voting periods, the first starting at 8:00 a.m. and the last ending at 10:00 p.m., raise additional concerns because such an election likely would require the Board agent to spend the entire day in a public place in San Bernardino County, further increasing the Board agent's potential exposure to COVID-19.

As noted above, the Employer has incorporated many of the accommodations used to combat the spread of COVID-19 in its plan for a manual election, such as social distancing, the use of plexiglass shields, and face coverings. However, in my view, in light of the current circumstances in San Bernardino County, the substantial interaction and exposure inherent in conducting a manual election presents a significant risk for all election participants despite the social distancing and protective measures proposed by the Employer or suggested by GC 20-10. For example, although the Employer directs that employees abide by certain protective measures while at work, it cannot police employees' adherence to those measures in the polling area and the Board agent cannot also police employees' adherence to those measures at the locations outside the polling area. Further, it is reasonable to conclude that conducting a manual election would only increase the possibility of greater interaction among the Employer's employees. This

increased interaction may be minimal, such as an employee standing in a line that would normally be out of the Fontana facility performing their delivery routes, or may be major, such as an employee infected with COVID-19, perhaps even unknowingly, reporting to work to vote in the election. The Board's manual procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote. Although the Employer's policy is to send home any employees who display symptoms of COVID-19, any election participant could be a pre-symptomatic or asymptomatic carrier of the virus. The CDC's "current best estimate" is that 50% of COVID-19 transmission occurs while people are pre-symptomatic and 40% of people with COVID-19 are asymptomatic²⁵ and would neither be identified nor have sought testing. Furthermore, setting aside the observers and Board agent who must remain in the polling area at all times during the voting period, the potential for exposure to COVID-19 from a pre-symptomatic or asymptomatic carrier voter would not be limited to the few minutes that voter would be in the polling area, as a forthcoming study published by the CDC concluded that the COVID-19 virus can survive for several hours in the air and maintain its infectivity.²⁶ Thus, if a pre-symptomatic or asymptomatic carrier voter entered the polling room and released – through a cough, a sneeze, or simply from speaking – the COVID-19 virus into the air through droplets of saliva, the observers and the Board agent would potentially be exposed to the virus for the remainder of the election and the vote count, and any subsequent voter would likewise be potentially exposed. This is especially concerning because a confined, indoor location – such as the proposed polling place – is essentially the ideal place for the COVID-19 virus to survive in the air.²⁷ Further, a manual election would require a Board agent to travel approximately 60 miles at a time when travel is discouraged.

The parties disagree regarding the extent of the virus among the Employer's employees. As such, I have no way of knowing what circumstances a manual election would be conducted under and how much the inherent risk in conducting a manual election during the current pandemic has been exacerbated by the Employer's employees already having been exposed to or infected with the COVID-19 virus. I am not reassured by the Employer's contention it is merely unaware of any positive tests, particularly when it admits it has asked symptomatic employees to self-quarantine.

²⁵ "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last accessed July 21, 2020). See also "Temporal dynamics in viral shedding and transmissibility of COVID-19" (April 15, 2020). *Nature*. <https://www.nature.com/articles/s41591-020-0869-5> ("We estimated that 44% ... of secondary cases were infected during the index cases' presymptomatic stage ...") (last accessed July 21, 2020).

²⁶ "Persistence of Severe Acute Respiratory Syndrome Coronavirus 2 in Aerosol Suspensions." *Emerging Infectious Diseases Journal*, Volume 26, No. 9 – September 2020 (Early Release). https://wwwnc.cdc.gov/eid/article/26/9/20-1806_article (last accessed July 21, 2020). See also, "Predicting the Decay of SARS-CoV-2 in Airborne Particles." <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> (last accessed July 21, 2020).

²⁷ "Predicting the Decay of SARS-CoV-2 in Airborne Particles." <https://www.dhs.gov/publication/st-predicting-decay-sars-cov-2-airborne-particles-factsheet> ("The results demonstrate that stability of the virus is dependent on environmental conditions. The greatest stability was observed under cool, dry, and dark conditions, similar to those found indoors." (last accessed July 21, 2020).

Thus, taken together, I find holding a manual election at the Fontana facility, under these circumstances, would entail significant risk to all involved. Accordingly, I find this risk constitutes extraordinary circumstances that make a mail ballot election appropriate.

B. A Mail Ballot Election is the Safer Alternative

The Employer argues that a mail ballot election presents greater risks due to the need to touch the mail. I do not agree. As cited previously, CDC guidance states that the virus is unlikely to be spread from products or packaging that are shipped over a period of days or weeks at regular temperatures, the type of shipping the Employer references as a risk factor. Further, the CDC's guidance on mitigating this risk, that an individual wash their hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol after collecting mail, is far easier to implement than the risk mitigation involved with the Employer's manual election proposal. Thus, I find that a mail ballot election is the safest method of conducting an election under the circumstances.

C. Disenfranchisement is a Greater Risk in a Manual Election

I do not discount the Employer's concerns about a lower participation rate in mail ballot elections, and I agree with the Employer that absent the current pandemic, I likely would order a manual election in this case. However, I do not find that concerns regarding the potential for lower participation invalidate the extraordinary circumstance that is the basis for my decision.

Additionally, I also note that conducting manual elections under the current circumstances poses a risk of disenfranchising voters. The Employer acknowledged that employees have been asked to self-quarantine. If those employees follow self-quarantine guidelines, they would not report to work and accordingly would not be able to vote. In fact, given the recommended 14-day quarantine period, any voter who within the 14 days preceding the election had merely been in direct contact with somebody with COVID-19 (or with somebody who is awaiting test results for COVID-19 or who has been directed by a medical professional to proceed as if they have tested positive for COVID-19, despite not being tested) would be expected to quarantine and would be unable to vote in the election because the Board's manual election procedures do not contain an absentee or remote voting option; an employee must appear in person at the polls to vote. In light of the current conditions in San Bernardino County, the potential for such voter disenfranchisement is real. Furthermore, during the current public health crisis, employees may be disenfranchised because they are wary of participating in an election process involving the degree of interaction required to conduct a manual election and may therefore refrain from participation. Finally, the Employer's regular screenings, and proposed second "wellness station" screening at the polls, raise the possibility of voters being turned away on the day of the election. I am not critical of the practice, and indeed it seems to be a conscientious effort to help identify those who could spread the virus, but it does pose concerns regarding access to the polls. When a mechanism exists to conduct an election without this potential interference, that mechanism avoids the potential problem of disenfranchisement. A mail ballot election is just such a mechanism.

D. A Mail Ballot Election is Appropriate Under the Current Extraordinary Circumstances

While I do not find a manual election to be impossible, I have determined that, under the current circumstances in San Bernardino County, which – as noted above – is “experiencing elevated disease transmission and increasing hospitalizations,”²⁸ conducting a mail-ballot election is the most responsible and appropriate method of holding an election without undue delay. Admittedly, the suggested manual election protocols outlined in GC 20-10, along with the Employer’s proposed procedures for a manual election, would reduce the risk of contracting COVID-19 if exposed to it during the election. However, there is no enforcement mechanics to ensure that all of these protocols/procedures are followed by all election participants at all times – at least none that do not involve disenfranchising voters or postponing or canceling the election on the day of the election. Moreover, even assuming these protocols could be enforced, there is no evidence in the record or publicly available, and backed by scientific studies, to establish that following these protocols would reduce the risk to an acceptable level under current circumstances. To the extent that the protocols would reduce the risk, I find that the remaining risk of exposure to and of contracting COVID-19 given the current conditions in the State of California and in San Bernardino County specifically still establishes the kind of “extraordinary circumstances” that make directing a mail ballot election appropriate. Moreover, directing a mail ballot election is consistent with current CDC guidance on elections, which acknowledges the inherent risk of in-person elections and, thus, encourages alternative methods of voting if allowed during this extraordinary COVID-19 pandemic.

In sum, in accordance with the Board’s duty under Section 9(a) of the Act to conduct secret ballot elections to determine employees’ union representation preference, I am directing an election in this matter as soon as practicable. To ensure the safety of all participants, to avoid the potential for disenfranchisement of employees, and to ensure compliance with this Agency’s obligations and responsibilities, I am directing a mail ballot election. A mail ballot election will provide the certainty of process and procedure to conduct an election within a reasonably prompt period and in a safe, responsible, and effective manner.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

²⁸ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CountyMonitoringDataStep2.aspx> (last accessed July 21, 2020). See also, “Coronavirus now spreading faster in suburbs like Orange County than in L.A. County.” (July 17, 2020) *Los Angeles Times* (“The community spread has brought other grim consequences ... in San Bernardino County, the number [of its hospitalized patients with confirmed coronavirus infection] has more than quadrupled ...,” and noting that San Bernardino County’s number of new COVID-19 cases over the preceding 14 days per 100,000 residents increased from 222 on July 1 to 408 on July 15). <https://www.latimes.com/california/story/2020-07-17/coronavirus-is-now-spreading-faster-in-the-suburbs-than-in-la-county> (last accessed July 21, 2020).

2. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of Section 2(6) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²⁹
3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.
4. The parties stipulated and I find that there is no collective-bargaining agreement covering any of the employees in the petitioned-for unit, and there is no contract bar, or other bar, to this proceeding.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit (the Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and part-time delivery drivers employed by the Employer at its Fontana facility.

Excluded: All other employees, including managerial, clerical, security guards, and supervisors as defined in the Act.

Thus, for the reasons detailed above, I will direct a mail ballot election in the Unit above, which includes approximately 58 employees.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **TEAMSTERS LOCAL 63**.

A. Election Details

I have determined that a mail ballot election will be held for the reasons I have explained above.

The ballots will be mailed by U.S. Mail to eligible voters employed in the appropriate collective-bargaining unit. On **Monday, August 10, 2020**, ballots will be mailed to voters by an

²⁹ The Employer, a Delaware corporation with an office and place of business located in Fontana, California, is engaged in the non-retail sale of distribution of food and supply items to restaurants and institutions. During the last twelve months, a representative period of time, the Employer had gross revenues in excess of \$500,000, and purchased and received goods at its Fontana, California facility valued in excess of \$50,000, directly from suppliers located outside the State of California.

agent of Region 31 of the National Labor Relations Board. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by **Thursday, August 20, 2020**, should communicate immediately with the National Labor Relations Board by either calling the Region 31 Office at (310) 235-7352 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 31 office by close of business (5:00 p.m.) on **Monday, August 31, 2020**. All ballots will be commingled and counted by an agent of Region 31 of the National Labor Relations Board on **Thursday, September 3, 2020 at 2:00 p.m.** likely via a videoconference to be arranged by the Region. In order to be valid and counted, the returned ballots must be received at the Regional Office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

B. Voting Eligibility

Eligible to vote are those in the Unit who were employed during the payroll period ending **Saturday, July 11, 2020**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States who are present in the United States may vote.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this Decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **Monday, July 27, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this Decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. An English and Spanish-language version of the Notice of Election will be sent by the Region separately at a later date. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. **The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election.** For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlrb.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Section 102.5(e) of the Board's Rules and Regulations does not permit a request for review to be filed by facsimile transmission. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and, therefore, the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated at Los Angeles, California this 23rd day of July 2020.



Mori Rubin, Regional Director
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064-1753